

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TODD LINN)	
Claimant)	
VS.)	
)	Docket No. 198,148
COLLINS BUS CORPORATION)	
Respondent)	
Self-Insured)	

ORDER

Both parties requested review of the Award entered by Administrative Law Judge Bruce E. Moore dated February 2, 1996. The Appeals Board heard oral argument July 2, 1996.

APPEARANCES

Claimant appeared by his attorney, James S. Oswalt of Hutchinson, Kansas. The respondent, a qualified self-insured, appeared by its attorney, John F. Hayes of Hutchinson, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for an August 19, 1994, work-related accident based upon a 53.5 percent work disability. Claimant requested review and asked the Appeals Board to review the issue of nature and extent of disability. The respondent requested review and asked the Appeals Board to review the issues of whether claimant sustained personal injury by accident

arising out of and in the course of his/her employment with respondent. out of and in the course of his employment with the respondent and whether claimant provided respondent with timely notice of accident. Those three issues raised by the parties are the only issues to be addressed on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be modified.

(1) The Appeals Board agrees with the analysis and conclusion of the Administrative Law Judge that claimant injured his back while working for the respondent on August 19, 1994. Claimant's testimony that he felt a stretch or pop in his back while lifting wall panel boards is similar to the history he gave the emergency room nurse when he sought medical treatment two days later. The Appeals Board finds that the greater weight of the evidence establishes that claimant sustained a work-related back injury on the date alleged and that the accident arose out of and in the course of claimant's employment with the respondent.

The respondent contends claimant failed to prove he sustained his back injury while working for the respondent. Although the respondent raised some question that claimant's injury may have been aggravated by his subsequent work for a construction company, the evidence failed to establish that fact.

(2) The Appeals Board also agrees with the conclusion of the Administrative Law Judge that claimant gave respondent notice of his back injury within ten days of its occurrence. Claimant testified that he advised his supervisor early Monday morning on August 22, 1994, that he hurt his back at work and would not be working the next two days. The Appeals Board believes that testimony.

(3) Because his is an "unscheduled" injury, claimant's right to receive permanent partial general disability benefits is governed by K.S.A. 44-510e. That statute provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Claimant presented the testimony of orthopedic surgeon C. Reiff Brown, M.D., who testified that claimant had degenerative disc disease at the L5-S1 intervertebral space which was rendered symptomatic by the August 19, 1994, work-related incident. Dr. Brown believes claimant now has a 10 or 11 percent whole body functional impairment as a result of his symptomatic condition of which 5 percent preexisted the August 19, 1994, accident. He also believes claimant should permanently avoid lifting more than 75 pounds, restrict lifting 40 to 75 pounds to an occasional basis, restrict frequent lifting to 40 pounds or less, and utilize proper body mechanics in all lifting activities.

Claimant testified that during the 15-year period preceding the date of accident he performed manual labor in the following jobs: worked for a concrete construction company making concrete barriers for bridges; drove a tractor; installed interior doors, windows, cabinets and cabinet doors, and trimmed out window sills in the construction of mobile homes; hung and boxed meat at a meat packing plant; roofed mobile homes for a mobile home manufacturing company; and while working for the respondent, built roofs and side walls for buses.

Dr. Brown reviewed the tasks claimant performed over the 15-year period before August 19, 1994, and indicated that claimant retained the ability to perform three of the nine tasks associated with claimant's employment with respondent, all six of his tasks as a mobile home roofer, both of his tasks with the meat packing company, all six of his tasks as an installer working on mobile homes, and four out of the six tasks he performed in concrete construction. Based upon that testimony, the Appeals Board finds that claimant retains the ability to perform 21 out of the 29 tasks he performed over the 15-year period preceding his work-related accident despite his permanent restrictions and limitations and finds that claimant has lost the ability to perform 8 out of 29, or 28 percent, of his former job tasks as a result of the August 19, 1994, accident. Before that accident claimant was able to perform all 29 former tasks.

After the August 1994 accident, claimant attempted to return to work for the respondent but he was terminated. Claimant sought and obtained work for a construction company framing houses, a job he held from approximately September 22, 1994, to April 6, 1995. Because of the nature of the work, claimant experienced back difficulties and discontinued that employment. Later, claimant received restrictions from Dr. Brown which would effectively prevent him from working as a framer or performing his former job at respondent's plant. At the time he last testified, claimant was not employed as he has been unable to find work.

Claimant's average weekly wage on the date of accident was \$363.42, as determined by the Administrative Law Judge. The Appeals Board adopts the Administrative Law Judge's analysis as set forth in the Award.

From September 22, 1994, through April 6, 1995, claimant was working as a framer for a construction company and had a post-injury average weekly wage of \$320. This finding is based upon the testimony of Jim Gruver, the owner of the construction company, who testified that claimant was paid \$8 per hour and was regularly scheduled to work 40 hours per week. Comparing \$320 to claimant's average weekly wage of \$363.42, yields a difference of 12 percent. Because claimant has been unable to find employment since

leaving the construction company, after April 6, 1995, the difference between claimant's pre-injury and post-injury average weekly wage is 100 percent. Likewise, during the period following claimant's injury when he did not work, August 19, 1994, through September 21, 1994, the difference in average weekly wage is also 100 percent.

Based upon the above, the Appeals Board finds that claimant has a 28 percent loss of ability to perform those work tasks which claimant performed over the 15-year period preceding the date of accident. The Appeals Board also finds a 12 percent difference in pre- and post-injury wages for the period from September 22, 1994, through April 6, 1995. For the period from August 19, 1994, through September 21, 1994, and for the period commencing after April 6, 1995, the Appeals Board finds a 100 percent difference in average weekly wage. As required by K.S.A. 44-510e, the Appeals Board averages those losses and finds a 64 percent permanent partial general disability for the period August 19, 1994, through September 21, 1994; a 20 percent permanent partial general disability for the period from September 22, 1994, through April 6, 1995; and a 64 percent permanent partial general disability for the period following April 6, 1995.

The Appeals Board finds that claimant's disability should not be reduced for alleged preexisting functional impairment under the provisions of K.S.A. 44-501(c). Before the August 1994 accident, claimant's back was asymptomatic and neither impaired nor disabled claimant in any manner. Based upon those facts, an expert's opinion regarding the extent of preexisting functional impairment is merely speculative. Also, because the work-related injury caused all of the disability experienced by claimant, reduction of the Award is not proper.

The Appeals Board adopts the findings of the Administrative Law Judge to the extent they are not inconsistent with the findings and conclusions made specifically herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated February 2, 1996, should be, and hereby is, modified; that claimant is entitled to receive permanent partial disability benefits for a 64% permanent partial general disability for the period August 19, 1994, through September 21, 1994; permanent partial general disability benefits for a 20% permanent partial general disability for the period of September 22, 1994, through April 6, 1995; and permanent partial disability benefits for a 64% permanent partial general disability for the period commencing after April 6, 1995.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Todd Linn, and against the respondent, Collins Bus Corporation, a qualified self-insured, for an accidental injury which occurred August 19, 1994, and based upon an average weekly wage of \$363.42. For the period from August 19, 1994, through September 21, 1994, claimant is entitled to 4.71 weeks of permanent partial general disability benefits at the rate of \$242.29 per week, or \$1,141.19, for a 64% work disability. For the period from September 22, 1994, through April 6, 1995, claimant is entitled to 28.14 weeks permanent partial general disability benefits at the rate of \$242.29 per week, or \$6,818.04, for a 20% work disability. For the

period following April 6, 1995, claimant is entitled to 232.75 weeks of permanent partial general disability benefits at the rate of \$242.29 per week, or \$56,393, for a 64% work disability, making a total award of \$64,352.23.

As of August 30, 1996, there is due and owing claimant 106 weeks of permanent partial general disability benefits at the rate of \$242.29 per week, or \$25,682.74, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$38,669.49 is to be paid for 159.60 weeks at \$242.29 per week until fully paid or further order of the Director.

The orders contained in the Award dated February 2, 1996, that are not inconsistent with the orders specifically made herein are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
John F. Hayes, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director